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Error to Corporation Court of Roanoke.

Action by Mary M. Franklin against the New York Life Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed, verdict set aside, and cause remanded for new trial.

Kime, Fox & McNulty, of Roanoke, for plaintiff in error.

A. P. Staples, Jr., of Lexington, and *A. B. Hunt*, of Roanoke, for defendant in error.

GOODE *v.* BRYANT et al.

March 11, 1915. On Rehearing, Jan. 1916.

[87 S. E. 588.]

1. Mortgages (§ 280*)—Assumption of Mortgage by Purchaser.—Where purchasers verbally agree to assume and pay a debt secured by a deed of trust, such agreement is as effective and binding as if it had been recited in the contract and conveyance, and the purchasers become primarily liable for the debt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 737, 740-750, 757-760; Dec. Dig. § 280.* 10 Va.-W. Va. Enc. Dig. 65.]

2. Covenants (§ 92*)—Estoppel (§ 65*)—Warranties—Breach—Title.—Where purchasers assumed payment of a debt secured by a deed of trust upon the land, and then defaulted, the vendor could sell under the trust deed, and buy in the land without breaching his covenants of warranty or becoming estopped to set up his title.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 101-103; Dec. Dig. § 92; Estoppel, Cent. Dig. §§ 155-158; Dec. Dig. § 65.* The court in speaking on this point said: "There is no foundation for the doctrine of estoppel in such a case, and the rule does not apply. See 16 Cyc. 697, 11 Am. & Eng. Ency. L. 412, 5 Mich. Dig. (Va.-W. Va. Enc. Dig.) 216, for reference to numerous authorities to this effect."]

3. Mortgages (§ 284*)—Assumption of Mortgage—Effect.—Where purchasers assuming payment of a debt secured by a deed of trust defaulted, and the vendor bought in the property, and having acquired title offered to allow the purchasers to complete their contract in accordance with its terms, the purchasers cannot complain of the vendor's actions, not being prejudiced.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 717, 759, 760; Dec. Dig. § 284.* 10 Va.-W. Va. Enc. Dig. 65.]

4. Equity (§ 428*)—Decrees—Entry.—Where complainant made no objections, the validity of a decree based on a report of the com-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

missioner pursuant to a prior decree, which had not been entered, was not affected by such nonentry.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1015-1019; Dec. Dig. § 428.* 8 Va.-W. Va. Enc. Dig. 183.]

5. Equity (§ 430*)—Decrees—Finality.—Where there had been several prior orders requiring complainants to mature their case, a decree requiring complainants to mature their cause within a fixed time, committing the cause to a commissioner and fixing a date for hearing, was not essential either to the validity or finality of a subsequent decree denying complainants relief on the ground that they had not established the averments of the bill, which was based on the report of the commissioners to the effect that complainants had failed to furnish evidence in time so the invalidity of the first decree will not affect the latter.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1034-1047; Dec. Dig. § 430.* 5 Va.-W. Va. Enc. Dig. 137.]

6. Judgment (§ 713*)—Final Judgment—What Is.—In a suit to set aside a contract for the purchase of land entered into by a husband and signed by the wife on the ground that the husband was incapacitated by reason of intoxicants, and that the wife signed under duress, the complainants were, a number of times, ordered to mature their case. Defendant filed a cross-bill praying enforcement of the contract, and the defenses of incapacity and duress were not immediately urged. Before they were urged the court rendered a decree denying complainants relief on the ground that they had failed to establish the averments of their bill. Held, that as complainants' bill could be dismissed without affecting defendant's cross-bill, and as complainants should, at the earliest time, have set up any defenses to the cross-bill, the decree denying them relief was a final adjudication, precluding them from afterwards raising the questions of incapacity and duress.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1099, 1234-1237, 1239, 1241, 1247; Dec. Dig. § 713.* 8 Va.-W. Va. Enc. Dig. 183.]

7. Equity (§ 445*)—Decrees—Review—Grounds.—After complainants filed a bill to set aside their contract for the purchase of land, the land sold was under a prior deed of trust, payment of which complainants agreed to assume. It was bought in by the vendor, and he offered to allow the complainants to take the land pursuant to the original contract, but his offer was refused. Thereafter complainants were denied relief, and subsequent decrees were rendered in favor of defendant, who had cross-complained, demanding enforcement of the contract. Subsequent complainants applied for review of such decrees on the ground of newly discovered facts relating to the capacity of the complainant who negotiated the contract,

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and as to defendant's abuse of the land in the interim. Held, that as the question of the validity of the contract had long since been adversely determined, and as complainants had refused defendant's offer, and it had been withdrawn, they were not entitled to a review of the original decree.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1078; Dec. Dig. § 445.* 5 Va.-W. Va. Enc. Dig. 137.]

8. Appeal and Error (§ 1151*)—Determination—Authority of Appellate Court.—Where the report of the commissioner and the papers in the cause showed that complainants, against whom relief was granted on the cross-bill, were liable for interest from a given time, the Supreme Court may, under the direct provisions of Code 1904, § 3451, make the correction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498-4506; Dec. Dig. § 1151.* 1 Va.-W. Va. Enc. Dig. 540.]

Appeal from Circuit Court, Fauquier County.

Bill by I. B. Bryant, committee of G. G. Bryant, and another against Jacob W. Goode, who filed a cross-bill. There were decrees for defendant on his cross-bill, and from a decree on complainants' bill in the nature of a bill of review, modifying the original decrees, defendant appeals, and complainants assign cross-errors. Reversed.

R. A. McIntyre, of Warrenton, and *Bumgardner & Bumgardner*, of Staunton, for appellant.

J. A. C. Keith, of Warrenton, for appellee.

NORFOLK & W. RY. CO. v. SINK'S EX'R.

Jan. 13, 1916. Rehearing Denied Feb. 2, 1916.

[87 S. E. 740.]

1. Railroads (§ 348*)—Injury on Crossing—Sufficiency of Evidence—Contributory Negligence.—Evidence in an action for the death of plaintiff's testatrix, killed on defendant's track at a crossing, held to warrant a finding that deceased was guilty of contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138-1150; Dec. Dig. § 348.* 11 Va.-W. Va. Enc. Dig. 597.]

2. Trial (§ 253*)—Instructions.—In an action for negligence of defendant railroad, an instruction that plaintiff must establish the negligence alleged was not erroneous as excluding from the consideration of the jury any evidence of defendant to that effect.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.* 7 Va.-W. Va. Enc. Dig. 718.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.